**U.S. Department of Labor**

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**Issue Date: 14 July 2003**

**BALCA Case No.: 2002-INA-172**
ETA Case No.: P1999-CA-09481690/ML

*In the Matter of:*

**IRENE'S CARE HOME,**
*Employer,*

*on behalf of,*

**EDNA BANAGALE**
*Alien*

Appearance: Evelyn Sineneng-Smith, Immigration Consultant
San Jose, California
For Employer and Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

## DECISION AND ORDER

**PER CURIAM.** Irene's Care Home ("Employer") has filed an application for labor certification on behalf of Edna Banagale ("Alien").[1] Employer sought to employ Alien to fill the position of nurse assistant. (AF 68) A high school education and three months of experience were required.[2]

[1] Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the records upon which the CO denied certification and Employers' request for review, as contained in the respective appeal files and any written arguments. 20 C.F.R. §656.27(c).

[2] The job duties listed can be found in AF 61.

The CO issued a Notice of Findings ("NOF") on September 14, 2001, proposing to deny certification on the grounds that Employer's license to operate a residential facility for the elderly was eight and a half years old.[3] (AF 68) This caused the CO to question whether Employer had a current job opening, operated an on-going business and / or could provide permanent full-time employment to which U.S. workers could be referred. (AF 68) The CO also questioned whether a nurse assistant position existed, given that the Dictionary of Occupational Titles ("DOT") states that such a worker "is under direction of nursing and medical staff" but the instant position was supervised by the "owner / licensee." The CO instructed Employer to document its ability to provide permanent, full-time employment to a U.S. worker at the terms stated on its ETA-750A. Part of the documentation required was a copy of Employer's business license, state and federal income and business tax returns, and information on which nursing and medical staff were directing the position.

The CO also advised Employer that (1) nurse aides are listed on Schedule B, and therefore Employer needed to petition for a Schedule B waiver; and (2) the position described a combination of duties, including general houseworker / launderer / cook, and Employer needed to revise the job duties to eliminate the combination of duties or seek to justify the combination of duties as either a business necessity or common in the labor force. (AF 68-69) Finally, the CO found that Alien did not meet the requirements of the job as set forth in the ETA 750 Part A, as she lacked three months of experience as a nurse assistant. Rebuttal on this issue required an amendment to the ETA 750 Part B which reflected that the Alien met the qualifications, or Employer could amend the required qualifications and indicate its willingness to retest the labor market. (AF 69-70)

Employer submitted rebuttal, which was received on October, 2001. (AF 35) It consisted of copies of a request for a Schedule B waiver, tax returns for the year 2000, and a memo explaining the combination of duties, as well as a stated willingness to re-advertise and delete the duties found objectionable by the CO. Employer also provided employment verification of the Alien as a live-in

[3]Those issues resolved prior to the issuance of the Final Determination will not be addressed herein.

domestic worker/care giver for a family with children from January 1997 to December 1997. (AF 63)

A Final Determination was issued on November 16, 2001. (AF 33-34) Therein, the CO denied certification, finding that Employer had failed to document that Employer was a fully functioning business able to provide permanent, full-time employment, having submitted a seven and a half year old license, only one year newer than the license reviewed prior to issuance of the NOF. Furthermore, the rebuttal failed to (1) address the issue of a nurse aide being supervised by medical/nursing staff; (2) correct the combination of duties issue; and (3) establish that Alien had the requisite experience. In the latter respect, the evidence of work as a "care giver" was not the equivalent to work as a nurse assistant. Since Employer had not provided for qualifications in a related occupation, to accept Alien's experience as qualifying would mean lowering the standard of qualification for Alien but not for U.S. applicants. Therefore the requirement was excessive and non-compliant with the regulations. (AF 33-34)

In January, 2002, Employer requested review of the denial of certification by the Board of Alien Labor Certification Appeals ("Board" or "BALCA" ). (AF 1)

## DISCUSSION

*In Doctors Medical Group of California,* 1994-INA-207 (May 8, 1995), the panel held that where the CO questioned whether there is a current existing business operated by Employer and requested specific documentation establishing same, Employer's submission of a copy of an expired business license does not prove existence of an ongoing business. The CO questioned whether the Employer was, in fact, able to provide permanent, full time employment at the terms and rates and conditions stated on the ETA 750A. Employer advertised for a nurse assistant, specifying that the position is uncertified. Employer was then advised that the DOT description of the position of nurse assistant lists the requirement that the position is performed under "direction of nursing and medical staff." When requested to provide rebuttal evidence that there was such a position available with it, Employer provided none. In *Mega Nursing Services, Inc.,* 1993-INA-105 (July 13 1994) (dec.on

recon.), the panel stated, "where the CO reasonably determines that the job duties match a DOT description which requires licensing, the [e]mployer bears the burden of proof on rebuttal that a license is not required." Similarly, it was determined here that the job requires that it be performed under direction of nursing and medical staff. It was incumbent upon Employer to establish otherwise. Employer failed to do so; as this alone is grounds for denial, the remaining issues need not be addressed.

## ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written

statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.